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# MASS CRIMES ADJUDICATION IN INDONESIA: LEARNING FROM THE CAMBODIAN EXAMPLE

*Renée Harrison* \*

## I. INTRODUCTION

Indonesia is a new democracy.<sup>1</sup> There have been obvious successes in the struggle to transition to this form of government.<sup>2</sup> Indonesia has even been used as a shining example of democracy for other Southeast Asian countries like Thailand and Myanmar that struggle to institute more democratic principles into their existing governments.<sup>3</sup> Indonesia has also been called “Southeast Asia’s most democratic nation.”<sup>4</sup> Notwithstanding all of these material successes, Indonesia has had a long history of serious human rights violations that sorely need investigation and prosecution.<sup>5</sup>

Arguably, the events that most need attention are a series of human rights violations that occurred from 1965–66, mostly perpetrated against those affiliated with the Communist party. The number of people who were killed remains in dispute, although estimates range from five hundred thousand to over a million.<sup>6</sup> As many as 1.7 million people were detained, and many others were tortured, beaten, and raped.<sup>7</sup> The Central Intelligence Agency reported it as one of the worst mass murders in the twentieth century.<sup>8</sup> Even though these events occurred almost fifty years

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<sup>1</sup> In 1998, Indonesia transitioned from an authoritarian regime under President Suharto to a “new democratic dispensation.” See Edward Aspinall, *The Irony of Success*, 21 J. DEMOCRACY 20, 20–22 (2010) (outlining Indonesia’s democratic transition).

<sup>2</sup> *Id.* at 20 (listing the decline of military political control, the resolution of peace in Aceh, the expansion of civil liberties, and the freely contested multiparty elections). In addition, in 2004 Indonesia began direct presidential elections, whereas previously a legislature controlled by Suharto had elected the president. Joe Cochrane, *In Southeast Asia, Indonesia Is an Unlikely Role Model for Democracy*, N.Y. TIMES, Sept. 4, 2014, <http://www.nytimes.com/2014/09/05/world/asia/in-southeast-asia-indonesia-becomes-a-role-model-for-democracy.html> (quoting Marcus Mietzner, an Indonesia specialist at Australian National University). Indonesia experienced an almost unheard of peaceful democratic transfer of power when it elected Joko Widodo as the next president. *Id.*

<sup>3</sup> *Id.*; Melissa Crouch, *Law Reform and Human Rights in Indonesia-Myanmar*, 63 THE NEWSLETTER 7 (2012).

<sup>4</sup> Cochrane, *supra* note 2.

<sup>5</sup> See Suzannah Linton, *Accounting for Atrocities in Indonesia*, 10 SING. Y. B. INT’L L. & CONTRIBUTORS, 199, 199 (2006) (listing crimes against humanities in Jakarta, Aceh and Papua).

<sup>6</sup> Robert Cribb, *Genocide in Indonesia, 1965–1966*, 3 J. GENOCIDE RES. 219, 219, 233 (2001).

<sup>7</sup> TERESA BIRKS, NEGLECTED DUTY: PROVIDING COMPREHENSIVE PREPARATIONS TO THE INDONESIAN “1965 VICTIMS” OF STATE PERSECUTION 11 (Int’l Cent. for Transitional Justice, ed., 2006), available at <http://www.ictj.org/sites/default/files/ICTJ-Indonesia-Reparations-Victims-2006-English.pdf>.

<sup>8</sup> Peter Dale Scott, *The United States and the Overthrow of Sukarno, 1965–1967*, 58 PACIFIC AFFAIRS 239, 239 (1985) (quoting CIA, Director of Intelligence, *Indonesia—1965: The Coup that Backfired*, Report, p. 71) available at <http://wvi.antenna.nl/eng/ic/pki/pds.html>.

ago, there is an acute need for this atrocity to be formally adjudicated. Critics say that creating a tribunal to pin the blame on a few luckless scapegoats would not help the victims of the crimes or help Indonesia progress as a nation.<sup>9</sup> However, establishing a court to examine those particular crimes against humanity would serve significant domestic and international interests.<sup>10</sup>

In recent decades there has been a proliferation of international criminal courts.<sup>11</sup> The most recent example of an international tribunal formed to investigate and prosecute war crimes and human rights violations is the Extraordinary Chambers in the Courts of Cambodia (the ECCC, or the Cambodian court). It was established in 2006, and although it has faced severe criticism, it has taken small, but important steps toward its particular goals, and the goals of every tribunal of its kind: to convict the perpetrators of egregious crimes against humanity, provide healing and reconciliation for victims, advance domestic legal capacity, and develop the international rule of law.<sup>12</sup> The ECCC incorporated many novel features into its structure, many of which have led to inefficiency, excessive expenditures, and subsequent criticism.<sup>13</sup> Notwithstanding its many struggles and failures, the ECCC is still an excellent experiment from which Indonesia could learn.

Not only is the ECCC the most current experiment in international justice, but Cambodia's situation also has striking similarities to that of Indonesia. They are both nations with weaker legal systems transitioning to democracy, and each faces the struggle of adjudicating mass human rights crimes that took place decades before. Using the ECCC as a model will help Indonesia avoid some of the mistakes and difficulties that have assailed the Cambodian court, while at the same time taking significant steps towards the protection of human rights and reconciliation of past grievances.

Although these particular atrocities in Indonesia happened fifty years ago, establishing an international court to begin addressing the crimes is an endeavor worth pursuing. This endeavor would likely have significant, positive ramifications both domestically and internationally. The best way to design this new court to achieve these outcomes would

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<sup>9</sup> Linton, *supra* note 5, at 202.

<sup>10</sup> See *infra* Part III.

<sup>11</sup> Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 295 (2003).

<sup>12</sup> Carla De Ycaza, *Victor's Justice in War Crimes Tribunals: A Study of the International Criminal Tribunal in Rwanda*, 23 N.Y. INT'L L. REV. 53, 53–55 (2010) (outlining the goals of developing the international rule of law, prosecution of past crimes, and reconciliation); Dickinson, *supra* note 11, at 304 (indicating the importance of capacity-building).

<sup>13</sup> Peter Maguire, *Cambodia's Troubled Tribunal*, N.Y. TIMES, July 28, 2010, available at <http://www.nytimes.com/2010/07/29/opinion/29iht-edmaguire.html> (referring to the "massive budget overruns" and "conspicuously slow pace" of the court).

be to examine the ECCC, model its successes, and avoid its failures. Though Indonesia faces its own unique difficulties, its situation shares key similarities with that of Cambodia. Learning from and altering the model of the ECCC to implement its own court system would help Indonesia address these mass human rights violations, vindicate its victims, improve its own legal system, as well as help shape the development of the international rule of law.

Indonesia faces many obstacles before it can even come close to implementing a court system like the ECCC. It would have to secure public support and institute major reforms of the military, judiciary, police, and Attorney General's office.<sup>14</sup> Further, evidence suggests that the Indonesian government would resist any sort of international intrusion into its governance.<sup>15</sup> As necessary prerequisites to the establishment of a court system, these steps deserve our attention and examination. However, they go beyond the scope of this Comment and will not be formally addressed.

Part II of this Comment will examine a brief history of the 1965 incident, relevant developments since that time, and the current political atmosphere in Indonesia. Part III will address why these particular crimes need adjudication, and specifically why an international hybrid tribunal is the best forum for their adjudication. It will focus on the important ramifications of such a court on both the domestic and international levels. Part IV will address how Indonesia should approach the establishment of an international tribunal, in part by presenting a case study of the Extraordinary Chambers in the Courts of Cambodia. Part V will explain how Indonesia should alter the Cambodian model to implement an effective tribunal of its own.

## II. BRIEF HISTORY AND CURRENT ATMOSPHERE

A failed military coup in the fall of 1965 set off the killings and other atrocities that occurred in 1965 and 1966 in Indonesia.<sup>16</sup> At that time,

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<sup>14</sup> Linton, *supra* note 5, at 203 (listing these things as obstacles to be overcome before efforts to secure accountability in Indonesia will be successful); *id.* at 205–06 (discussing judicial corruption and the legal system). The Attorney General's Office has specifically resisted the investigation and prosecution of the 1965–66 killings. See *Information and Documentation on Impunity in Indonesia*, STOP IMPUNITY! (Oct. 31 2013), <http://www.stopimpunity.org/page45.php>. The National Commission of Human Rights in Indonesia (Komnas HAM) can only follow up by requesting a report of the investigation from the Attorney General's office. Other forms of recourse are unavailable. *Id.*

<sup>15</sup> In East Timor, an ad hoc court was established to address human rights violations over the resistance of Indonesia, and only because of constant International pressure. Linton, *supra* note 5, at 207, 218.

<sup>16</sup> Cribb, *supra* note 6, at 231–33. Though the coup happened “early in the morning of October 1,” *id.* at 231, it is commonly called the 30 September Movement, and said to have occurred on

President Sukarno led the country and the military held significant power.<sup>17</sup> The Communist Party or PKI (Partai Komunis Indonesia), however, was gaining power under Sukarno's "Guided Democracy" regime.<sup>18</sup> The party already claimed three million members at that time, and it continued to gain new support when Indonesia experienced a severe economic downturn.<sup>19</sup> In the early morning of October 1, troops raided the houses of several anti-communist generals.<sup>20</sup> Three were shot in their homes; three were taken to an Air Force base and later killed.<sup>21</sup> The coup was poorly planned, and the army was able to end it within a few days.<sup>22</sup> While the issue remains highly contested,<sup>23</sup> the PKI was ultimately blamed for the uprising.<sup>24</sup> Wild rumors and propaganda were spread about the party, demonizing them and turning the entire nation against them.<sup>25</sup>

In response to the public fear and outcry against the "Communist" coup, Suharto, a rising political and military leader, and current Lieutenant-General in the army's Strategic Reserve,<sup>26</sup> was given the authority to take "any steps necessary" to eliminate the PKI.<sup>27</sup> To achieve this goal, the military sanctioned the killing of Communists in any part of Indonesia.<sup>28</sup> While the military sometimes took the lead role in the killings, they commonly enlisted and provided local militias (mostly consisting of local youth groups) to hunt out and eliminate party affiliates.<sup>29</sup> Sometimes entire villages were wiped out.<sup>30</sup>

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September 30. See Sara Schonhardt, *Veil of Silence Lifted in Indonesia*, N.Y. TIMES, Jan. 18, 2012, <http://www.nytimes.com/2012/01/19/world/asia/veil-of-silence-lifted-in->; BIRKS, *supra* note 7, at 9.

<sup>17</sup> Cribb, *supra* note 6, at 229 (describing the strength of the army in government positions and access to weapons).

<sup>18</sup> "To most observers there appeared no doubt that the main beneficiary of Guided Democracy was the Indonesian Communist Party." *Id.*; see also *id.* at 229–31 (outlining Sukarno's Guided Democracy).

<sup>19</sup> *Id.* at 229–30 (detailing the economic decline).

<sup>20</sup> *Id.* at 231.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Several theories surround who might be behind the Coup, some of which implicate Sukarno and Suharto besides the PKI. *Id.* at 231–32 ("Both the Communist Party and Sukarno had good reason to want the removal of the high command. . . . Also possible is that the coup was to some extent prompted or planned by the enemies of Sukarno and the communists in order to compromise them. There is inconclusive but not entirely negligible evidence implicating both Suharto and the American Central Intelligence Agency in this respect."); see generally W.F. Wertheim, *Whose Plot? – New Light on the 1965 Events*, 9 J. CONTEMP. ASIA 197 (1979).

<sup>24</sup> Cribb, *supra* note 6, at 232.

<sup>25</sup> For more specific details, see *id.* at 232. Besides the cruel September 30 killings, the PKI were also blamed for the economic crisis. *Id.*

<sup>26</sup> *Id.* at 231.

<sup>27</sup> BIRKS, *supra* note 7, at 10.

<sup>28</sup> Cribb, *supra* note 6, at 233.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

Estimates of how many people were killed vary widely, ranging between hundreds of thousands and a million.<sup>31</sup> However, over a million more were arrested and detained without trial; those detained were questioned, beaten, tortured, and raped; some were detained for up to fourteen years.<sup>32</sup> The military and local militias targeted not only people labeled as Communists, but also those directly, filially, or only loosely connected to the PKI.<sup>33</sup> Only 767 of these Communist affiliates were actually convicted of a crime.<sup>34</sup> Anyone classified as a Communist, or having a broadly defined “relationship” with the party, was stigmatized, denied the right to vote, and could not join the military or become a civil servant.<sup>35</sup>

Although these events took place more than fifty years ago, they are still pervasively influential in Indonesia,<sup>36</sup> and the victims and their families still feel the effects.<sup>37</sup> As of 2006, the military formally warned the House of Representatives in Indonesia that sympathizers of the PKI had infiltrated the House, implicating those who had “filial links” with 1965 detainees,<sup>38</sup> and the government still requires school textbooks to implicate the PKI when discussing the attempted coup of 1965.<sup>39</sup>

People in Indonesia rarely discuss these historical events involving the PKI. However, people have recently begun to break the silence and open up a dialogue about their difficult history.<sup>40</sup> This discussion has taken place in books and documentaries exploring the experience of victims and questioning the actions of the leaders who still remain in power today.<sup>41</sup> In 2012, Indonesia’s National Commission on Human Rights (Komisi Nasional Hak Asasi Manusia, or Komnas HAM)

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<sup>31</sup> See *id.* generally. There are many different estimates from different sources. General Sarwo Edhie boasted up to three million had been killed; NGOs quote numbers up to one million. BIRKS, *supra* note 7, at 10. Komnas HAM reported 1.5 million people killed. *AGO Rejects Komnas HAM Report on 1965 Massacres*, JAKARTA GLOBE, Nov. 10, 2012, available at <http://thejakartaglobe.beritasatu.com/archive/ago-rejects-komnas-ham-report-on-1965-massacres/>.

<sup>32</sup> BIRKS, *supra* note 7, at 11.

<sup>33</sup> *Id.* at 10.

<sup>34</sup> *Id.* at 12.

<sup>35</sup> *Id.* at 16–17.

<sup>36</sup> See Schonhardt, *supra* note 16.

<sup>37</sup> As recently as the nineties, 1965 victims were disenfranchised. BIRKS, *supra* note 7, at 17 (“In addition, the 1965 victims were prevented from voting or standing for any legislative positions, including local, regional, and national elections.”). In 2006, there were warnings that the House of Representatives had been “infiltrated by sympathizers of the PKI.” *Id.* at 26–27. (“These accusations seem intended to target those members of parliament that have or are said to have filial links with ex 1965 political detainees based on the argument that you can’t guarantee that a child has broken away from the ideology of his/her parents and that at the very least they have a historical grudge.”) (citation and quotations omitted).

<sup>38</sup> *Id.* at 26–27.

<sup>39</sup> Schonhardt, *supra* note 16.

<sup>40</sup> *Id.*

<sup>41</sup> See *id.*; “Breaking the Silence,” by Putu Oka Sukanta, published in March 2014. “The Act of Killing,” a documentary about the events, was released in 2012. The feature film “Seng Penari” was released in 2011.

conducted an in-depth, three-year investigation into the acts against the PKI, declaring them a major abuse of human rights, and submitting an 850-page report to Indonesia's Attorney General, urging an investigation.<sup>42</sup> Although the Attorney General claimed that the evidence that Komnas HAM submitted was insufficient and refused to conduct an independent investigation,<sup>43</sup> Komnas HAM's actions show that the events of 1965 and 1966 may still be present in the mind and culture of Indonesians.

The current political situation in Indonesia provides an opportune time to reopen investigation and to adjudicate these events. This year, Indonesians democratically elected Joko Widodo (Jokowi) as their new president.<sup>44</sup> His victory is a significant triumph for democracy in Indonesia, since the power of the presidency transferred to the opposing political party, and since Jokowi became the first president who did not have significant ties to the former government under Suharto.<sup>45</sup> This could prove useful for a few reasons. Jokowi could use some of the political momentum of the democratic transfer to address the human rights tragedies in Indonesia, increasing the legitimacy of Indonesia in the international sphere by showing that the "new" Indonesian government does not stand for these crimes against humanity. Also, because Jokowi appears to be more removed from the old government and Suharto's New Order,<sup>46</sup> the extra distance might prove insulation enough to implicate those who held power during that regime.

### III. A NEED FOR ADJUDICATION: THE IMPORTANCE OF AN INTERNATIONAL TRIBUNAL

Many human rights abuses have occurred in Indonesia that demand redress, some of which have taken place recently and could be more easily addressed than the mass killings of 1965–66.<sup>47</sup> However, these mass killings may be the best place to start. This remains one of the most horrible massacres in Indonesia's history; in terms of numbers it has had the most far-reaching effects. Arguably these events still impact millions

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<sup>42</sup> Margareth S. Aritonang, *Komnas HAM Declares 1965 Purge a Gross Human Rights Violation*, JAKARTA POST, July, 23, 2012, available at <http://www.thejakartapost.com/news/2012/07/23/komnas-ham-declares-1965-purge-a-gross-human-rights-violation.html>.

<sup>43</sup> *AGO Rejects Komnas HAM Report on 1965 Massacres*, *supra* note 31.

<sup>44</sup> Cochrane, *supra* note 2.

<sup>45</sup> Since the transition from the Suharto regime, the last four presidents have all had significant ties to the government under Suharto. Aspinall, *supra* note 1, at 21. Jokowi, on the other hand, was not tied to the Suharto era, or to the military. Cochrane, *supra* note 2. See also *Competing Visions*, THE ECONOMIST, July 5, 2014, available at <http://www.economist.com/news/leaders/21606285-political-naif-represents-more-hopeful-future-indonesia-suharto-era> ("[Jokowi] is not from the usual clutch of political and business dynasties and their sleazy cronies.").

<sup>46</sup> Cochrane, *supra* note 2.

<sup>47</sup> See Linton, *supra* note 5.

of people.<sup>48</sup> The fact that discussion of the issue still continues shows that although it took place decades ago, it is still potently present in the lives of Indonesians. The amount of effort and time that went into the Komnas Ham report also shows the importance that Indonesians place on addressing the issue. In addition, starting with this event could help set in place a culture of adjudication that would be beneficial to the redress of other, more recent crimes.

It is also important to approach these issues on an international level, for example, by implementing an international tribunal. The worth of an international tribunal is not especially evident when viewed from a monetary standpoint. For example, the ECCC has spent \$204.6 million as of 2013, and only prosecuted a handful of people.<sup>49</sup> Other international courts do not have a better track record; the cost per indictment at the ICTY (International Criminal Tribunal for the Former Yugoslavia), ICTR (International Criminal Tribunal for Rwanda), and ICC (International Criminal Court) was \$11.2 million, \$18.5 million, and \$39 million, respectively.<sup>50</sup> But the value of a court cannot be boiled down to a dollar sign. Even if only a few people are convicted, the mere establishment of a court has far-reaching influences. It helps a country reconcile with a difficult part of its history; it helps with victim vindication and healing.<sup>51</sup> It could specifically help Indonesia obtain legitimacy in the international community, take steps toward democratization,<sup>52</sup> and investigate and prosecute other human rights violations. Perhaps most importantly, however, the use of an international tribunal to adjudicate these crimes could have significant consequences for the international community and the development of the international rule of law.

Indonesia's use of an international tribunal to address human rights violations will help develop international law to more clearly define specific crimes and to facilitate the adjudication of like crimes in the

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<sup>48</sup> An overwhelming 1.7 million people were detained. BIRKS, *supra* note 7, at 11. Also, Suharto passed broad classifications that denied political and other rights of people only loosely connected with the PKI. *Id.* at 15–17.

<sup>49</sup> ECCC *at a Glance*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, (Apr. 2014), [http://www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance%20-%20EN%20-%20April%202014\\_FINAL.pdf](http://www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance%20-%20EN%20-%20April%202014_FINAL.pdf).

<sup>50</sup> M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 1031 (2d ed. 2012).

<sup>51</sup> Seeta Scully, *Judging the Successes and Failures of the Extraordinary Chambers of the Courts of Cambodia*, 13 ASIAN-PAC. L. & POL'Y J. 300, 303 (2011) ("There are two general schools of thought concerning the primary purpose of international tribunals: tribunals as vindication of human rights, and tribunals as social healing.") (emphasis omitted).

<sup>52</sup> Establishing the rule of law in Indonesia, as well as accounting for violations of human rights, will help Indonesia in the path to democracy. Matthew Draper, Note, *Justice as a Building Block of Democracy in Transitional Societies: The Case of Indonesia*, 40 COLUM. J. TRANSNAT'L L. 391, 391, 393 (2002); Jared Levinson, *Indonesia's Odyssey: A Nation's Long, Perilous Journey to the Rule of Law and Democracy*, 18 ARIZ. J. INT'L & COMP. L. 103, 103 (2001).



future. In particular, an international tribunal could substantially expand the definition of genocide. Genocide, as currently defined by the 1948 UN Convention on the Prevention and Punishment of Genocide, is “[committing an act] with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.”<sup>53</sup> This definition does not include classifications such as political affiliation or social class. This is meaningful, since so many of the massacres and killings that have occurred, including the one in Indonesia, are outside this definitional scope. A broadened meaning would further include the millions of deaths during The Great Leap Forward in China, as well as the political and social killings that took place in Russia.<sup>54</sup> Currently, however, killings like these are not labeled as genocide, and thus do not receive the same recognition or moral condemnation.

This disparate treatment could be because political affiliation is said to be a mutable trait, whereas the others are not. However, one could also argue that people have the ability to choose their religion, and that the fact that a choice is involved does not prevent killing on the basis of religion from being encompassed in the definition of genocide. A political affiliation is not so far off from a religious affiliation; both involve closely held beliefs, ideas, and associations. The Universal Declaration of Human Rights gives people the right to freedom of thought, conscience,<sup>55</sup> opinion, expression, and peaceful assembly.<sup>56</sup> This does not specify a freedom to affiliate with a particular group, but carves out enough space to accommodate that freedom.

Furthermore, although social class is not completely immutable, it shares similar characteristics with ethnicity, race, and nationality, in that it is often an assigned group—a classification that is not easily altered. A foundational idea found in the UN Convention on the Prevention and Punishment of Genocide is the importance of being free from the “risk of being killed by the state, and free[ ] from having your ‘group’ being the target of violence,”<sup>57</sup> which should include political or social class affiliation.

Precedent supports expanding the definition of genocide beyond the express stipulations of the Convention on Genocide. The ICTR qualified

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<sup>53</sup> United Nations Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948 [hereinafter Convention on Genocide], available at <https://treaties.un.org/doc/Publication/UNTS/Volume%2078/volume-78-I-1021-English.pdf>.

<sup>54</sup> See William Easterly et al., *Development, Democracy, and Mass Killings*, 11 J. ECON. GROWTH 129, 149, 152 (2006); DAVID SCOTT, CHINA STANDS UP: THE PRC AND THE INTERNATIONAL SYSTEM 39 (Routledge, ed., 2007) (commenting on the number of deaths caused by the Great Leap Forward: “Social and class redistribution underpinned the internal radicalization sought by Moa’s Great Leap Forward.”).

<sup>55</sup> THE UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 18 (U.N. Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/index.shtml#a18>.

<sup>56</sup> *Id.* art. 19–20.

<sup>57</sup> Easterly, *supra* note 54, at 130.

rape and other forms of sexual violence as acts of genocide.<sup>58</sup> Although the tribunal fit rape under Article 2 of the Convention on Genocide as an act “causing serious bodily or mental harm to members of the group,”<sup>59</sup> its classification significantly deviated from the typical definition of genocide<sup>60</sup> and certainly paved the way for future courts to consider acts of sexual violence when adjudicating genocide. This is a good example of how an international tribunal had a palpable effect on the international rule of law and great influence over future mass crimes courts.

Having a tribunal formally describe the mass killings of certain political affiliates as genocide is no further stretch than a tribunal including rape and sexual violence in the definition of genocide, and this definition would encompass acts of violence almost indistinguishable from those traditionally defined as genocide. Killing a group of people because of their ideology has the same resonance whether that ideology is political or religious.

Defining these violent crimes as genocide has important ramifications. It would provide more vindication for victims, labeling the atrocity committed against them as universally condemnable. Having an international element in a mass crimes court will not only bring vindication to victims and help develop the domestic legal system, but it could have important ramifications in the international sphere as well. In this particular case, adjudication of the Indonesian mass killings could help expand the definition of genocide to include many atrocities almost indistinguishable from those already covered.

#### IV. LEARNING FROM THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA

In establishing an international tribunal, it would be helpful to closely examine the structure of the Cambodian court in order to form a well-structured, more efficient model tailored to Indonesia’s specific situation. Indonesia faces many of the same struggles as Cambodia, and Cambodia’s court structure is therefore a good starting point. For example, like Cambodia, a single leader in a despotic regime governed Indonesia.<sup>61</sup> Both countries struggled to transition to a democratic state,

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<sup>58</sup> Timothy Gallimore, *The Legacy of the International Criminal Tribunal for Rwanda (ICTR) and its Contributions to Reconciliation in Rwanda*, 14 NEW ENG. J. INT’L & COMP. L. ANN. 239, 246–47 (2008).

<sup>59</sup> *Id.*; Convention on Genocide, *supra* note 53.

<sup>60</sup> Gallimore, *supra* note 58, at 246.

<sup>61</sup> See generally, Aspinall, *supra* note 1, at 20–22; BEN KIERNAN, *THE POL POT REGIME: RACE, POWER, AND GENOCIDE IN CAMBODIA UNDER THE KHMER ROUGE* (Yale University Press, ed., 2014).

and both still have problems with governmental corruption.<sup>62</sup> Strong military authorities have ruled each.<sup>63</sup> The atrocities committed in both countries also have similarities. Hundreds of thousands of people were killed and detained, which left innumerable victims and suffering families.<sup>64</sup> Lastly, in both cases, the events took place decades in the past.<sup>65</sup> On the other hand, however, there are key differences between the two countries' situations. In particular, Indonesia has asserted its sovereignty and resisted assistance from the international community, whereas Cambodia requested international support to help set up a war crimes tribunal.<sup>66</sup> Because of the similarities, Indonesia could use Cambodia's ECCC as a model to structure its own court, but the differences between the countries would require significant changes in the model to accommodate Indonesia's specific situation and better meet financial and efficiency goals.

Cambodia established the ECCC in 2006 to address the egregious acts that took place during the Pol Pot era.<sup>67</sup> In establishing the ECCC, Cambodia requested the assistance of the UN,<sup>68</sup> though it expressed a desire to maintain sufficient domestic control over the proceedings.<sup>69</sup> As one of the first of a new breed, the ECCC is structured as a hybrid court and implements many unique and innovative features.<sup>70</sup> The court is split into distinct domestic and international sides; it has both domestic and international judges, co-prosecutors, and co-investigating judges.<sup>71</sup> The funding scheme is also divided.<sup>72</sup> A "supermajority," meaning a majority vote that includes at least one international judge, is needed to secure some judgments.<sup>73</sup> The ECCC also has an ambitious civil participation

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<sup>62</sup> See *infra* notes 152, 154–55.

<sup>63</sup> Helen Fein, *Revolutionary and Antirevolutionary Genocides: A Comparison of State Murders in Democratic Kampuchea, 1975 to 1979, and Indonesia, 1965 to 1966*, 35 COMP. STUD. SOC'Y & HIST. 796, 813 (1993) (highlighting the "coming to power of military leaders in the name of the revolution, or for the defense against the revolution").

<sup>64</sup> See *supra* note 31.

<sup>65</sup> The Indonesian incident took place from 1965–66, almost fifty years ago. The Cambodian killings took place from 1975–1979. See ECCC at a Glance, *supra* note 49.

<sup>66</sup> See Linton, *supra* note 5.

<sup>67</sup> *Introduction to the ECCC*, EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, <http://www.eccc.gov.kh/en/about-eccc/introduction> (last visited Apr. 9, 2015).

<sup>68</sup> Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, UN – Cambodia, June 6, 2003, G.A. Res. 57/228(B) [hereinafter UN Cambodian Agreement].

<sup>69</sup> John D. Ciorciari & Anne Heindel, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal*, 35 MICH. J. INT'L. L. 369, 415 (2014) (discussing the Cambodian Government's resistance of international control).

<sup>70</sup> *Id.* at 371.

<sup>71</sup> *Id.* at 372, 374.

<sup>72</sup> *Id.* at 407.

<sup>73</sup> Any decision of the Pre-Trial court requires an affirmative four out of five votes. In the Trial Chamber, a guilty verdict requires four out of five votes, and an affirmative decision in the Supreme Court Chamber requires five out of seven votes. *Judicial Chambers*, EXTRAORDINARY CHAMBERS

system for victims.<sup>74</sup> The court does have its critics, some of which claim that the ECCC is not a model to be cloned or that it is a mistake that should be avoided.<sup>75</sup> Notwithstanding these criticisms, the ECCC has had material successes. It has investigated and prosecuted several individuals, developed notable jurisprudence, and connected thousands of victims to the proceedings.<sup>76</sup>

Indonesia should specifically look to the Cambodian court for guidance when establishing its own court because Cambodia's situation is much like that of Indonesia. Indonesia should examine the ECCC's many innovative features to determine whether it could benefit Indonesia's own international judicial system. By using this ready-made example from a country with many situational and cultural similarities, Indonesia would not have to start its design from scratch, and could improve upon the working, if inefficient, court design of the Cambodians. This Part will explore the court's structure and innovations, and its successes and criticisms, in order to determine the best organization for Indonesia's court.

### A. The Split Court

The ECCC was joint-established by the Royal Cambodian Government and the UN, and it is located on-site in Cambodia.<sup>77</sup> Like other international tribunals, it has both local and international personnel, and it applies a blend of domestic and international law.<sup>78</sup> It is composed of a pre-trial chamber and a trial chamber, each with five judges, and a Supreme Court chamber with seven judges; it is the first tribunal that has a majority of domestic judges in each chamber.<sup>79</sup> The ECCC employs both a Cambodian and international co-prosecutor and a co-investigating judge.<sup>80</sup> It also has a split funding scheme with separate financial support for the domestic and international sides.<sup>81</sup> These somewhat divisive features were designed to accommodate and respect Cambodian sovereignty.<sup>82</sup> While the UN pressed for an international prosecutor and an international majority, the Royal Cambodian government wanted to

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IN THE COURTS OF CAMBODIA, <http://www.eccc.gov.kh/en/judicial-chamber> (last visited Apr. 9, 2015).

<sup>74</sup> See generally Ciorciari & Heindel, *supra* note 69, at 425–31.

<sup>75</sup> *Id.* at 437; see *id.* at 404 n.188.

<sup>76</sup> See generally *id.*; *ECCC at a Glance*, *supra* note 49. It is difficult to measure the successes (healing, closure, truth, reconciliation) of a mass crimes tribunal. See Maguire, *supra* note 13.

<sup>77</sup> UN Cambodian Agreement, *supra* note 68.

<sup>78</sup> See Dickinson, *supra* note 11, at 295; Ciorciari & Heindel, *supra* note 69, at 369.

<sup>79</sup> Ciorciari & Heindel, *supra* note 69, at 372.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 372, 407.

<sup>82</sup> *Id.* at 372.

retain sufficient political control of the court.<sup>83</sup> This is a legitimate concern, as mass crimes have significant domestic importance, and international courts can alienate locals from the process and proceedings.<sup>84</sup>

The ECCC also implemented an ambitious outreach and victim participation program that mostly has included free transportation for hearings, public visits or other proceedings, as well as a civil party participation system.<sup>85</sup> These things have led to notable successes, including solid convictions and jurisprudence, positive capacity building, and significant local involvement in the proceedings.<sup>86</sup> However, the ECCC is seriously deficient in both original design and implementation.

### B. Victim Participation

Victim participation is an important part of the hybrid court, since it furthers an important interest in connecting locals to the criminal process.<sup>87</sup> It also promotes individual and social healing.<sup>88</sup> Though the ECCC did not have an explicit provision for victim outreach, it assigned the Public Affairs Section (PAS) and the Victim's Unit outreach responsibilities.<sup>89</sup> Funding and budget concerns limited the capabilities of these two offices. The PAS circulated written materials and published a website; however, much of that information has no ability to reach the illiterate or those living in the rural countryside.<sup>90</sup> Regardless, the PAS's efforts to connect locals—the victims and survivors—to the proceedings of the court generated great success: The ECCC constructed the largest public viewing gallery available at any mass crime tribunal and it provided free transportation to the court in order to encourage public visits.<sup>91</sup> Members of the public can take part in a study tour or see the actual court proceedings.<sup>92</sup>

The sheer number of participants has been unparalleled.<sup>93</sup> In just 2012 alone, nearly 100,000 people were estimated to have visited the

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<sup>83</sup> *Id.*

<sup>84</sup> Dickinson, *supra* note 11, at 302 (indicating that “the lack of connection to local populations has been problematic” in “purely international processes”).

<sup>85</sup> Ciorciari & Heindel, *supra* note 69, at 421, 426.

<sup>86</sup> *Id.* at 373; *see generally id.* at 380–77, 420–37.

<sup>87</sup> *See id.* at 420.

<sup>88</sup> *See id.* (“Victims can more easily observe or participate in the proceedings, which offer them an opportunity to engage in truth-telling, contribute to the search for justice, and otherwise seek empowerment and a degree of personal and collective reconciliation.”).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 421.

<sup>91</sup> *Id.* at 421–22.

<sup>92</sup> *See* Ciorciari & Heindel, *supra* note 69, at 422.

<sup>93</sup> ECCC at a Glance, *supra* note 49.

court.<sup>94</sup> The number of total visitors from 2009 to the present is estimated at 390,000.<sup>95</sup> Of those who attended the trial hearings of *Case 002*,<sup>96</sup> eighty-three percent were Cambodians who used the free transportation provided.<sup>97</sup> Although the number of local participants is impressive, some express doubts as to whether the participation actually leads to a deeper understanding of the court and what it is trying to accomplish.<sup>98</sup>

Another important aspect of the ECCC's victim participation is the capacity for victims to join a suit as a civil party.<sup>99</sup> During *Case 001*, victims could submit complaints to the Co-Prosecutors and participate as full parties.<sup>100</sup> The Internal Rules were changed during *Case 002*, requiring victims to join a consolidated group represented by one national lawyer and one international lawyer, decreasing individual participation.<sup>101</sup> In *Case 002* the Pre-Trial Chamber initially admitted almost 4,000 civil participants, but only 750 were ultimately retained.<sup>102</sup> Reparations for the crimes were limited to those that are "collective and moral," and initially should be borne by those convicted,<sup>103</sup> but many of the requests in *Case 001* were rejected because the accused was indigent, and the court could not support the reparations.<sup>104</sup> In future cases, victim reparations will probably be supported by NGOs.<sup>105</sup>

### C. Jurisprudence and the Development of the Rule of Law

Another praiseworthy success of the Cambodian court has been its development of solid jurisprudence. The Cambodian court faced many challenges, including political interference, a history of corruption and an underdeveloped legal system.<sup>106</sup> In addition, the majority of domestic

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<sup>94</sup> *Id.* (including study tours, court and VIP visits, video screenings, and school lectures in addition to public hearing participation).

<sup>95</sup> *Id.* (including study tours, court and VIP visits, video screenings, and school lectures in addition to public hearing participation).

<sup>96</sup> The Cambodian court's caseload is divided up into four different cases, Cases 001, 002, 003, and 004. *Case 001* ended in conviction in 2012. *Case 002* was split into two parts; the first trial concluded in 2013, and the second trial began in 2014. Cases 003 and 004 are still in the judicial investigation phase. *Id.*; see also Thomas Fuller & Julia Wallace, 2 *Khmer Rouge Leaders Are Convicted in Cambodia*, N.Y. TIMES, Aug. 6, 2014, available at <http://www.nytimes.com/2014/08/08/world/asia/decades-after-khmer-rouges-rule-2-senior-leaders-are-convicted-in-cambodia.html>.

<sup>97</sup> Ciorciari & Heindel, *supra* note 69, at 422.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 425.

<sup>100</sup> *Id.* at 426.

<sup>101</sup> *Id.* at 427.

<sup>102</sup> *Id.* at 429.

<sup>103</sup> *Id.* at 430.

<sup>104</sup> *Id.*

<sup>105</sup> See *id.*

<sup>106</sup> *Id.* at 371.

judges left little room for UN control or guidance.<sup>107</sup> However, the ECCC has shown its ability to confront difficult legal questions and to apply norms of international law to controversial issues.<sup>108</sup>

There are several examples of sound jurisprudence by the ECCC; one of the most notable was the ECCC's decision on the applicability of Joint Criminal Enterprise Liability (JCE). The JCE is used to connect organizers and planners of crimes to those who executed the crimes for them, and it has three theories of accountability. The ECCC accepted the first two theories: JCE-1 (where the accused shares the intent to commit the crime within the court's jurisdiction) and JCE-2 (where the accused has personal knowledge of ill-treatment and intent to further that system).<sup>109</sup> But the more controversial JCE-3 (where the accused is responsible for acts outside the scope of the plan, but were foreseeable) was not accepted.<sup>110</sup> The ECCC conducted a very comprehensive judicial analysis and found that JCE-3 did not exist in customary international law.<sup>111</sup> Though this finding challenged an earlier ICTY case, it was based on solid reasoning.<sup>112</sup> This decision, as well as two others like it that challenged national norms but provided sound and reasoned findings,<sup>113</sup> shows that the ECCC was able to tackle difficult issues and provide substantial evidence and reason to support its decision. This is a significant feat for a court that struggles with political interference and lacks a solid foundation in legal training.

Even though these applications of JCE are not binding law outside of the ECCC's jurisdiction, they still contribute to a lasting legacy of Cambodian and international law. The JCE-3 finding was the first to contradict the holding of the ICTY,<sup>114</sup> and now that the existence of JCE-3 in customary law has been questioned, investigations and discussions on the subject will have to tackle that contradiction. While the law on the subject was not changed by the ECCC, the ECCC's ruling will have a direct impact on the law's development going forward. These jurisprudential decisions were also the very first to challenge the norms

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<sup>107</sup> *Id.* at 373.

<sup>108</sup> *See id.* at 380, 382.

<sup>109</sup> *Id.* at 381.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 381–82.

<sup>113</sup> The ECCC had two other good examples of sound jurisprudence. The first was a decision that found that Duch, the accused person in *Case 001*, had been illegally detained before the trial, and that this detention was a violation of his human rights. *Id.* at 382. One commenter observed that "[t]his sort of challenge is unprecedented in modern Cambodian history and a great victory for the rule of law." *Id.* at 383. The other example came during the trial of Ieng Sary in *Case 002*. She had previously been domestically pardoned for her violation of human rights. The court closely examined the opinions of international, regional and state courts, and other human rights bodies, and determined that the domestic pardoning was not in accordance with customary international law and Cambodia's treaty obligations. *Id.* at 384–86.

<sup>114</sup> *Id.* at 382.

laid out by domestic law, which is a victory for fair trials rights and the rule of law in Cambodia<sup>115</sup> and sets a good precedent for other struggling judicial systems.

#### D. Capacity Building

Capacity building—promoting professional competence, legal reform, and a culture of respect for law, as well as leaving an informational legacy<sup>116</sup>—is one of the main potential benefits of a hybrid court.<sup>117</sup> Although the ECCC was predicted to have notable legacy value,<sup>118</sup> in reality, it has had little extra resources and time to dedicate to capacity building.<sup>119</sup> Still, capacity building has occurred.

The initial outline for the ECCC mentioned the training of local defense attorneys, but otherwise had no formal provision or structure for capacity building.<sup>120</sup> Later, in 2010, the Legacy Advisory Group and a Legacy Secretariat were created, but they have remained mostly inactive and there is general confusion as to whether the domestic or international component has the responsibility or authority to take the lead on capacity-building activities.<sup>121</sup>

Besides these obstacles, some capacity building has occurred, and many of the important effects of capacity building will still take place even though there is not a formal structure established. The ECCC has established a few training programs,<sup>122</sup> but much of the capacity building has occurred through the interaction of domestic and international personnel, and the more important effects will be felt just by having a solid, positive example of a court in Cambodia.<sup>123</sup> Many of the fair trial concepts the ECCC uses, including the presumption of innocence and clear legal justification for detention and sentencing, are not features of the Cambodian judicial system, and some expect them to trickle down to influence the local system.<sup>124</sup> Some characteristics of the ECCC have already been implemented in certain local Cambodian courts.<sup>125</sup> In

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<sup>115</sup> *Id.* at 383.

<sup>116</sup> *Id.* at 431.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 431–32.

<sup>120</sup> *Id.* at 432.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 434 (including internships, workshops, conferences, lectures, and training sessions with local prosecutors and defense attorneys, as well as outreach programs for law students).

<sup>123</sup> *Id.* at 433–35.

<sup>124</sup> *Id.* at 435.

<sup>125</sup> One of the Co-Investigating Judges, You Bunleng, also sits on the Cambodian Court of Appeals, and, due to his involvement with the ECCC, has made some changes to his own court system, including establishing a witness room and introducing a computerized case file system to help protect victims and the rights of the accused. *Id.* at 433–34.



addition, the locale of the court and the fact that proceedings take place in the Khmer language make ECCC law an extremely good resource for Cambodian law students and professionals.<sup>126</sup>

#### E. Struggles of the ECCC

Although positive results are coming from the ECCC, it has struggled with serious obstacles. Some are obstacles that any international-type tribunal faces, while others specifically come from the unique structure of the ECCC. Many of the problems originate from the split court structure and from the supermajority requirement.

The split court structure has resulted in delay, deadlock, and much inefficiency. The process begins by preliminary submission from the Co-Prosecutors (CPs), and an investigation by the Co-Investigating Judges (CIJs).<sup>127</sup> Because of the double-headed offices, both processes were expected to take time; however, the CPs took one year to investigate the first five suspects before their submission, and the CIJs investigated their first subject for two years.<sup>128</sup> Much time was wasted in this two-part investigation, with the different parties doubling each other's work.<sup>129</sup> The inclusion of investigating judges was supposed to increase efficiency by providing in-depth evidence that would then be verified in a brief trial.<sup>130</sup> Because this process works against the goals of a hybrid court, as a substantial benefit of a mass crimes tribunal is realized by retelling the story in a public forum and giving the public an eye into the proceedings. In practice, the ECCC has produced an in-depth investigation and a full-length trial, undermining the original efficiency purposes of the CIJs.<sup>131</sup>

The supermajority requirement was originally a prerequisite for UN participation.<sup>132</sup> However, from the experience of the ECCC, it can lead to excessive delay and impasses.<sup>133</sup> For example, when there is a dispute between the Co-Prosecutors or Co-Investigating Judges about whether an investigation should proceed, if there is no supermajority in the Pre-Trial Chamber, the investigation will presumably proceed. Even though in the case mentioned above there was a built-in procedure to overcome a supermajority deadlock, it still resulted in a one-year delay.<sup>134</sup> Also, while the Trial Chamber can only convict a person with the vote of at least one international judge, there are no other guidelines given on how

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<sup>126</sup> *Id.* at 437.

<sup>127</sup> *ECCC at a Glance*, *supra* note 49.

<sup>128</sup> Ciorciari & Heindel, *supra* note 69, at 375.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 376.

<sup>131</sup> *Id.* at 376–77.

<sup>132</sup> *Id.* at 403.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

to address other split decisions the court faces.<sup>135</sup> With the current Cambodian court structure, there are multiple points for disagreement and deadlock, which have even proven to shield the decision makers from accountability.<sup>136</sup>

The funding system also suffers because of the split court structure. Each side is in charge of providing funding for its own expenses, which has made the national side very vulnerable to underfunding.<sup>137</sup> While other international tribunals are supported by contributions from the UN budget, the ECCC has relied mostly on funds from foreign donor contributions.<sup>138</sup> Only seventeen percent of the ECCC's national funding comes from the Cambodian Government.<sup>139</sup> This has led to several funding crises as foreign suppliers have withheld funds because of disapproval of court developments, mostly from the side of the Cambodians.<sup>140</sup> As of 2013, the ECCC has already cost \$204.6 million,<sup>141</sup> and while this amount is significantly lower than the cost of the ICTY or ICTR,<sup>142</sup> the ECCC has cost more per case or individual indicted.<sup>143</sup> The ECCC has also proven much more costly than was initially estimated (\$56 million), and though it has secured many funds and has been a less-costly alternative to an international tribunal, it has still been plagued by inefficiencies from the structure of the court.<sup>144</sup>

In sum, the Cambodian court was beleaguered by structural flaws, inefficiencies, and funding difficulties. Many of the novel features of the court, including the double team of prosecutors and investigating judges, the domestic majority and supermajority requirements, as well as the civil victim participation, contribute to unnecessary complications within the court. Many times this has resulted in duplicate work, deadlock, delays, or just ineffectiveness. However, the court has accomplished very notable things, and has done so in the face of the overwhelming domestic challenges of weak judicial and legal systems, rampant corruption and potential political interference, and financial stresses and burdens. The court has produced well-investigated, fair trial convictions of a number

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<sup>135</sup> *Id.* at 405.

<sup>136</sup> *Id.* at 403.

<sup>137</sup> *Id.* at 418; see also David Scheffer, *No Way to Fund a War Crimes Tribunal*, N.Y. TIMES, Aug. 28, 2012, available at <http://www.nytimes.com/2012/08/29/opinion/Funding-Cambodias-War-Crimes-Tribunal.html>.

<sup>138</sup> Ciorciari & Heindel, *supra* note 69, at 418.

<sup>139</sup> *Id.* at 418.

<sup>140</sup> *Id.*

<sup>141</sup> *ECCC at a Glance*, *supra* note 49.

<sup>142</sup> The ICTY cost \$2.3 billion to date and the ICTR \$1.8 billion. Ciorciari & Heindel, *supra* note 69, at 417.

<sup>143</sup> *Id.*

<sup>144</sup> For example, the salaries of the national employees are experiencing "upward pressure" because of the salaries of the better-qualified, international personnel. *Id.* at 417.

of people. The court has been a solid example of legal jurisprudence, which is a shining beacon of hope to other struggling judicial systems, and which speaks well about the ability of a court to help contribute to the body of law in which it takes part. Finally, there has been a vast, unprecedented amount of victim participation, giving evidence to the idea that these undertakings will have palpable effects on those who suffered because of crimes, and on the Cambodian society in general.

Mass crimes tribunals will fall short of the lofty goals allocated to them; they can attempt to reach a sort of justice, but in significant ways, their acts will never make up for the suffering, pain, loss of dignity, and deprivation of life. However, international tribunals, and the ECCC specifically, have still accomplished good things, taken small steps toward justice, and made important contributions to modern international law.<sup>145</sup>

## V. ESTABLISHING A TRIBUNAL IN INDONESIA

Indonesia is a place where a mass crimes tribunal, if designed with proper structure and procedures, could make great progress towards adjudication and social healing. In order to avoid the pitfalls of the ECCC while capitalizing on its successes, the Indonesian court should be structured as an international hybrid court, with both domestic and international judges. It should retain domestic and international Co-Prosecutors; however, the Investigating Judge should be from international personnel. In addition, there should be a majority of international judges in each court, but a modified supermajority rule, requiring at least one domestic and one international judge vote to proceed. Indonesia should also modify the victim participation scheme, eliminating civil party participation while still maintaining as much outreach and participation as possible. Lastly, Indonesia should use a funding scheme similar to the ECCC's. This structure will overcome many of the efficiency struggles of the ECCC, but retain the opportunities for domestic growth, victim participation and development of good law.

### A. A Hybrid Court

Although one of the main challenges to the efficiency of the ECCC is the division of the court along international and domestic lines, it is still very important that Indonesia establish a court with both domestic and international characteristics. This hybrid structure provides many of the same benefits as a fully international court, but it also enhances the

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<sup>145</sup> See *supra* Part III for a discussion on how the ICTR changed what constituted genocide.

court's legitimacy, gives more opportunity for capacity building, and is more affordable.

Strictly international and strictly domestic courts both suffer from legitimacy problems. When dealing with mass crimes, these problems become even more acute. The atrocity of the crimes necessitates international adjudication and accountability, but domestically, the government and the public want to maintain some sort of control of the judicial process and the ensuing healing process. An exclusively international court will lack perceived legitimacy from the populace,<sup>146</sup> but an exclusively domestic court lacks legal legitimacy, especially in situations like Indonesia's, where the international community is very dubious about the competence of the country's legal system.<sup>147</sup>

A hybrid court remedies both of these situations. It requires close collaboration between local and international authorities, and its on-site location is structured to instruct the public and involve victims. It also helps with judicial legitimacy in the eyes of the international community and in the eyes of the populace.<sup>148</sup> Because Indonesia has resisted international influence in the past,<sup>149</sup> and because the 1965 incident remains a very sensitive issue, with suspected perpetrators still holding positions of power,<sup>150</sup> both the international and domestic aspects of a hybrid court are needed.

Another asset of a hybrid court is its potential for capacity building, which cannot occur in an international court run solely by foreigners.<sup>151</sup> And with the challenges that face a justice system like Indonesia's, a purely domestic court would not receive the international expertise and interchange that would help Indonesia's system to progress. Furthermore, Indonesia's judicial system faces similar problems to that of Cambodia. Corruption is rampant<sup>152</sup>—Cambodia and Indonesia have reported very

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<sup>146</sup> Dickinson, *supra* note 11, at 302–303, 306 (Perceived legitimacy problems arose against the ICTY due to the lack of connection to local populace, and also during the East Timor court, when UN officials did not consult the local population about governance decisions.).

<sup>147</sup> In 2002, the United Nations Special Rapporteur said that Indonesia's legal system was the worst he had ever seen. Linton, *supra* note 5, at 205. Also, in 2014, Indonesia was ranked as number 107 out of 177 corrupt countries. *Corruption by Country/Territory*, TRANSPARENCY INT'L, <http://www.transparency.org/country/#IDN> (last visited Apr. 9, 2015).

<sup>148</sup> Oftentimes this is most important when domestic adjudication could be seen as victor's justice. See Dickinson, *supra* note 11, at 306.

<sup>149</sup> See Linton, *supra* note 5.

<sup>150</sup> THE ACT OF KILLING (Final Act for Real 2012).

<sup>151</sup> See Dickinson, *supra* note 11, at 304.

<sup>152</sup> Linton, *supra* note 5, at 205–06. Indonesia was ranked as number 107 out of 177 corrupt countries, and the public viewed the judiciary branch as the fourth most corrupt organization (after parliament, the police and political parties). *Id.*; *Corruption by Country/Territory: Public Opinion*, TRANSPARENCY INT'L [http://www.transparency.org/country/#IDN\\_PublicOpinion](http://www.transparency.org/country/#IDN_PublicOpinion). (last visited Apr. 9, 2015). Cambodia ranked as number 156 out of 177. *Corruption by Country/Territory*, TRANSPARENCY INT'L <http://www.transparency.org/country/#KHM> (last visited Apr. 9, 2014).

similar judiciary bribe rates.<sup>153</sup> They are also both trying to develop legal systems after the reign of despotic leaders.<sup>154</sup> Similarly, both systems have been criticized for political interference.<sup>155</sup> While Cambodia did not have a formal structure set up for capacity building, some still incidentally occurred, mostly because of the merging of domestic and international personnel.<sup>156</sup>

In order to capitalize on this important benefit of hybrid courts, and in order to avoid the lack of responsibility and thus lack of action, Indonesia should appoint one international and one domestic director to head a capacity building project. This way, legacy work will be a priority and not just a by-product of the court. The legal reform that the court could accomplish could very well be the most lasting benefit to Indonesia's political and judicial system. This appointment structure will clearly establish responsibility on both sides and avoid the confusion over accountability that the ECCC experienced.

Aside from legitimacy and capacity building, a hybrid court also has the benefit of being more affordable.<sup>157</sup> At first blush, this is not a strength of the ECCC, and admittedly, the Cambodian court costs much more than expected and more per conviction than other tribunals. However, the ECCC still functions millions and millions of dollars below the cost of the ICTY and the ICTR, and by implementing the structural changes suggested, an Indonesian court could come out with a much lower price tag. Generally, courts on-site are more cost-effective because investigations are less expensive, because there is closer access to witnesses and evidence, and because salaries for local personnel are typically much lower than those for higher qualified, international personnel.<sup>158</sup>

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<sup>153</sup> Sixty-six percent of Indonesians admitted to paying a bribe to the judiciary in the last twelve months, extremely close to the sixty-five percent of Cambodians. *Indonesia*, TRANSPARENCY INT'L <http://www.transparency.org/gcb2013/country/?country=indonesia> (last visited Apr. 9, 2015); *Cambodia*, TRANSPARENCY INT'L <http://www.transparency.org/gcb2013/country/?country=cambodia> (last visited Apr. 9, 2015).

<sup>154</sup> See Fein, *supra* note 63, generally for brief histories of the Khmer Rouge and Sukarno regime. Cambodia's establishment of the ECCC gives evidence of legal development. See *supra* Part I for evidence of Indonesia's recent legal development.

<sup>155</sup> Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in Criminal Justice*, 12 CRIM. L. F. 185, 188 (2001) (noting the "prevalence of corruption and political influence over the judiciary" in Cambodia); Gary Goodpastor, *Law Reform in Developing Countries*, 13 TRANSNAT'L L. & CONTEMP. PROBS. 659, 671 n.17 (2003) ("Indonesians have a very low level of confidence in the integrity and competence of their judicial system. Corruption is rampant, decisions can be purchased, the courts are subject to political interference, and legal transparency is inadequate.") (quoting *Transforming the Legal System: From Rulers' Law to Rule-of-Law*, 1 VAN ZORGE REPORT ON INDONESIA 4 (2000)).

<sup>156</sup> Ciorciari & Heindel, *supra* note 69, at 432–33.

<sup>157</sup> "Hybrid courts were created in the hope that they would . . . deliver credible justice at a lower cost than fully international proceedings." *Id.* at 370–71.

<sup>158</sup> See *id.* at 417.

### B. A Semi-Split Structure

Many of the inefficiencies of the ECCC can be chalked up to the double team of prosecutors and investigating judges, and to the majority of domestic judges sitting on the bench.<sup>159</sup> However, many of the benefits of a hybrid court (greater local control, interaction that produces capacity building, more effective social healing, etc.) would not be had if, in practice, the court functioned like a full international tribunal. In order to increase efficiency while still giving enough domestic control, Indonesia's court should have the following key differences in structure.

First, the domestic judge majority structure should be replaced by an international judge majority structure. The ECCC's supermajority should also be modified to require the votes of one domestic judge and one international judge in most decisions, with *ex ante* procedures laid out in case of judicial deadlock. An international judge majority structure will promote judicial independence, as international judges can be chosen from a larger pool and have come from legal systems with histories of judicial independence and integrity.<sup>160</sup> Although this structure will detract from Indonesia's control over the procedures, requiring both international and domestic votes will give back some domestic power while at the same time avoiding deadlocks like those that faced the ECCC. This lower bar for the supermajority, while easier to achieve, will undoubtedly still lead to many split courts. Indonesia should provide presumptions for such circumstances and give preemptive guidance to the judges about what should be done in case of an impasse. With these procedures in place, Indonesia can anticipate and prevent deadlock, maintain sufficient local control, and develop judicial legitimacy.

Secondly, Indonesia should retain both domestic and international prosecutors, but retain only the international investigating judge and not the domestic investigating judge. This also strikes a balance between increasing the efficiency of the court while still preserving adequate domestic control. The ECCC's CPs and CIJs received criticism for double work and inefficiency.<sup>161</sup> However, progress is bound to be slower in a two-head office,<sup>162</sup> and efficiency also needs to be balanced with the capacity-building benefits provided by such an integrated office. The greater burden on efficiency was the investigating judge (whose split decisions caused detrimental delays in the ECCC) and the general

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<sup>159</sup> *See id.* at 438.

<sup>160</sup> *See id.*

<sup>161</sup> *See generally id.* at 374–77.

<sup>162</sup> *See id.* at 378.

lengthiness of the process brought on by the bifurcated office.<sup>163</sup> What is more, the prosecutors did not overly contribute to delays in the process, and in other courts foreign and domestic prosecutors have successfully worked together.<sup>164</sup> Because of these things, Indonesia should institute two Co-Prosecutors, while having just one international Investigating Judge.

### C. Victim Involvement

Victim participation is an important feature of the ECCC that the Indonesian court should not neglect. Participation helps victims to validate their suffering and it also allows for a cathartic release of hurt and pain.<sup>165</sup> It has therapeutic value for an audience taking part in the story and validating the experience of the witness.<sup>166</sup> The Cambodian court had unprecedented victim participation and observation, and it also provided the unique opportunity for victims to receive civil relief as part of the proceedings,<sup>167</sup> to connect Cambodians to the process, and to help them toward closure and reconciliation. However, civil victim participation is not a realistic source of reconciliation in a mass crimes court. Only a fraction of those initially accepted as civil parties were ultimately admitted to the Cambodian court, and they were joined into a consolidated group and many did not receive the reparations they sought.<sup>168</sup> This particular feature is not worth the cost or effort, when a simpler system of victim testimony and observation provides comparable social benefits.

Indonesia, like Cambodia, needs to implement victim participation. Millions of people were directly affected by the brutalities that occurred,<sup>169</sup> and there is still much cultural hostility toward the targeted groups.<sup>170</sup> Having a public forum where the particular suffering of those people is vindicated would do much for their personal healing<sup>171</sup> as well as help shift the overall public attitude toward those people and those events.<sup>172</sup> Indonesia should remove the civil recovery aspect of victim

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<sup>163</sup> See *id.* at 375 (showing that the joint work of foreign and domestic prosecutors enhanced the legitimacy of the East Timor court).

<sup>164</sup> Dickinson, *supra* note 11, at 307.

<sup>165</sup> Gallimore, *supra* note 58, at 257.

<sup>166</sup> *Id.*

<sup>167</sup> See Ciorciari & Heindel, *supra* note 69, at 425.

<sup>168</sup> *Id.* at 427; “[O]ut of the 3,864 victims joined to the case, only about 750 were admitted.” *Id.* at 429 (discussing the number of victims admitted to Case 2 as a civil party).

<sup>169</sup> See Cribb, *supra* note 6.

<sup>170</sup> Textbooks are still governmentally required to implicate the PKI when discussing the events of September 30, 1965. Schonhardt, *supra* note 16. See generally *supra* notes 36–37.

<sup>171</sup> Gallimore, *supra* note 58, at 257.

<sup>172</sup> Erin Ann O’Hara & Sara Sun Beale, *On Legitimacy Theory and the Effectiveness of Truth Commissions*, 72 L. & CONTEMP. PROBS. 123, 125, 130 (explaining how truth and reconciliation

participation, and have a model closer to that of the ICC,<sup>173</sup> where victims may apply to take part in the proceedings, may appoint legal representation, or may have it appointed to them. Through their legal counsel, the victims may participate in all stages of the proceedings by attending hearings and voicing their concerns directly to the judge deciding the course of action for investigation or in levying accusations against a defendant. While implementing this type of system, Indonesia should also replicate the impressive victim involvement of the ECCC, and provide ample opportunity for observation of proceedings. Progress toward reconciliation requires justice to be done and requires that it be *seen* being done.<sup>174</sup> Indonesia should also prioritize free public transportation for tours and study groups. Circulated materials and an informational website could potentially reach a high percentage of Indonesia's people, as its literacy rate is notably higher than Cambodia's. These things will provide the societal benefits of victim participation, while at the same time reducing cost and inefficiency by removing a resource-draining, ineffective civil relief system.

#### D. Funding

Indonesia should implement a funding system similar to Cambodia's, split along domestic and international lines.<sup>175</sup> Although Cambodia's split-funding scheme led to several financial crises, it still managed to produce sufficient funds. The hybrid structure of the court helped secure contributions from donors who wanted to see the process continued.<sup>176</sup> The court is kept on a constant financial precipice and critics wonder if "donor's fatigue" detracts from the work the court could accomplish.<sup>177</sup> But this system does provide another source of international oversight for the court. Also, if Indonesia designs a court with more international components, showing a willingness to concede on potentially problematic features, it could gain more legitimacy in the eyes of international contributors, and Indonesia might not have as difficult a time securing funds as Cambodia.

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commissions can help change societal beliefs and attitudes by providing new information from a credible source).

<sup>173</sup> VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT, INTERNATIONAL CRIMINAL COURT 10, 11, 16 *available at* <http://www.icc-cpi.int/NR/rdonlyres/8FF91A2C-5274-4DCB-9CCE-37273C5E9AB4/282477/160910VPRSBookletEnglish.pdf> (last visited Apr. 9, 2015).

<sup>174</sup> Gallimore, *supra* note 58, at 262.

<sup>175</sup> Though the financial basis of a tribunal plays an integral part in its success, an in-depth financial analysis goes beyond the scope of this Comment, and so only the barest forms of a funding structure are laid out here.

<sup>176</sup> Ciorciari & Heindel, *supra* note 69, at 418.

<sup>177</sup> Scheffer, *supra* note 136.



## VI. CONCLUSION

In sum, there are many things that Indonesia could do to improve upon the model of the Cambodian court. However, it is almost impossible to predict a tribunal's success from the outset, in part because defining the success of a court is not a simple task.<sup>178</sup> Constructing a court from the Cambodia model then becomes a balancing test. It was easy to see, in hindsight, the weaknesses of the court's structure, and these things should be taken in consideration of the particular goals, interests, and circumstances of Indonesia.

The Cambodian court was plagued by inefficiencies and excessive expenditures, but it was able to produce good jurisprudence, thorough investigations and convictions, in the face of political interference and corruption. Many of the structural features of the Cambodian court came about because Cambodia wanted to maintain sufficient control over it.<sup>179</sup> Although Indonesia also has a strong interest in sovereignty and political independence, these interests need to be balanced, and some features need to be altered in order to avoid the weaknesses of the ECCC. Because of this, Indonesia should apply a more international design than that of Cambodia. The majority of judges should be international rather than domestic, and they should retain a semi-split court system with two prosecutors but only one international investigating judge. With these features, Indonesia will run a more efficient court, while at the same time gaining more legitimacy in the international community. Retaining part of the split court structure will also help with the interaction between domestic and international personnel, and the information sharing and capacity building that goes along with it. There are some features of the ECCC that Indonesia should strive to replicate. Victim participation is a vital component, and if any closure, reconciliation, and healing are to take place, it needs to be prioritized. Capacity building and the development of good jurisprudence will help the court to share its legacy with Indonesia's domestic system, and the greater rule of law.

Establishing a mass crimes tribunal is a colossal undertaking, and there are high stakes involved on all sides. The sheer egregiousness of the crimes calls out for attention from the international community, the local community, and the victims in particular, and there are significant considerations to balance while trying to serve the interests of these parties. An international tribunal has more far-reaching effects than merely bringing perpetrators of human rights crimes to justice. It can

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<sup>178</sup> See Maguire, *supra* note 13 (discussing Cambodia's claims that the ECCC would lead to healing, reconciliation and closure, and also noting the difficulties of measuring those kinds of goals).

<sup>179</sup> See Ciorciari & Heindel, *supra* note 65.

bring individual and social healing through telling the story of the victims, thus bringing recognition and vindication of their pain and public condemnation upon the responsible parties. It can also bring social healing by publically acknowledging a crime that, especially in Indonesia's case, for years continued undiscussed and its survivors stigmatized. A tribunal can also do much to help a country's legitimacy and the development of its legal system. Taking the time, money, and effort to develop and implement a system shows acceptance of the international standard of human rights, and also proves a willingness and a devotion to that standard. Finally a tribunal is important on an international level. It helps with the development of the rule of law generally, by providing more defense of and advocacy for human rights, and can help in very specific ways, by redefining terms and eking out what the customary standards should be.

A mass crimes tribunal is a worthwhile undertaking. There are things that take place in our world that should never happen in a humane society. Even though our ways of correcting these things, or just addressing them, are not perfect, they still need to be done. A tribunal is important in its own right, if only to assure humanity that we will undertake the impossible, because other atrocities deserve our attention. If we can make any small steps towards a better, more humane world, toward reconciliation for victims, and toward a better law for the future, then that is what we should do.